TAN HUN WAH

v.

PUBLIC PROSECUTOR AND ANOTHER APPEAL

SUPREME COURT, KUALA LUMPUR
TAN SRI DATUK AMAR HAJI MOHD JEMURI BIN SERJAN CJ (BORNEO),
TAN SRI DATO' HAJI MOHD AZMI BIN DATO' HAJI KAMARUDDIN SCJ,
DATO' PEH SWEE CHIN SCJ
[CRIMINAL APPEAL NO. 106 & 107 OF 1988]
15 DECEMBER 1993

CRIMINAL LAW: Conviction under s. 39B of the Dangerous Drugs Act 1952 - Appeal against conviction - Whether conviction should stand - Delay by trial Court - Delay in the trial and in supplying the grounds of judgment - Whether delay excessive - Whether appellants prejudiced - Conviction - Whether it should be quashed and be substituted with offence of possession of raw opium - Section 6 of the Act - Sentence - Whether death sentence should be set aside and life sentence imposed - Section 39A of the Act, Courts of Judicature Act 1964, s. 60.

CRIMINAL PROCEDURE: Delay of the Court in conduct of trial and in supplying grounds of judgment for purposes of appeal - Whether delay excessive - Prejudice to appellants - Whether actual or presumptive.

The appellants in the consolidated appeal were jointly charged under s. 39B of the Dangerous Drugs Act (DDA) 1952, with trafficking in 37.326 kilogrammes of raw opium on 8 February 1984, in Baling, Kedah. From their date of arrest in 1984, they were continuously under remand, until 30 October 1988, when they were found guilty by the Alor Setar High Court, convicted and sentenced to death.

The appellants appealed, on the ground of excessive delay. Trial had commenced in January 1988, was adjourned on a number of occasions, the appellants finally being found guilty and convicted in October 1988. The whole trial was spread over a period of over 9 months, though the prosecution had required only 5 days and the defence two days to complete their respective evidence. There was a further delay of more than 3 years, this time in the trial Judge supplying the grounds of judgment on the appellants appealing.

Held:

[1] The delay was excessive, regarding the trial and the supplying of the judgment.

There are many causes of delay, and the delay itself can take the form of an abuse of process or may appear in various forms of prejudice or unfairness. To obtain a permanent stay of prosecution, the application must be based on actual prejudice or unfairness and not merely 'presumptive prejudice'. The principle of fair trial should be applied even more rigorously where the excessive delay is caused not by the prosecution but by the trial Court itself.

[2] Underlying the grievance of excessive delay is an implicit model of a just system of justice, in which each case moves to conclusion within a time interval proportionate to its importance and complexity. There was nothing in the appeal record in the case before the Court to suggest that the delay was in any way connected with any element of complexity in either the case for the prosecution or that of the defence.

[3] As could be seen from the numerous adjournments, the trial was chopped up and conducted on an instalment basis for a few days at a time extending over a period of more than nine months. It is certainly unacceptable to adjourn a partly heard criminal trial *sine die* or to a date to be fixed. Such a practice would inevitably result in inordinate delays in the administration of justice and affect the quality and reliability of the judgment of the Court in the evaluation of the evidence particularly in the demeanour of witnesses during cross-examination, and the special significance of certain primary evidence as the basis for making inferences. Unless absolutely necessary, the Court should insist on oral submission in criminal trials, when the evidence is still fresh in the minds of all concerned.

[4] There was excessive delay in the supplying of the judgment by the trial Judge. The delay was wholly intolerable and made an utter farce of the proper and expeditious administration of justice.

[5] The delay in supplying the judgment must have contributed to the trial Judge erring in law in placing the *onus* on the defence to clear the unexplained behaviour of one Akuaili Singh on the trafficking charge. He had omitted to ask himself whether the defence had on balance rebutted the statutory presumption of trafficking under s. 37(da) of the Act. The burden on the

defence is merely to cast a doubt in the prosecution case, and the defence had discharged its legal burden. It is trite law that no burden at all is placed on the defence to clear whatever doubts that have been created in the mind of the learned Judge. In the absence of Akuaili Singh giving evidence, the law required that these doubts must be resolved in favour of the appellants.

[6] The conviction under s. 39B of the Act should be quashed and the death sentence set aside.

However, since there was ample evidence that the appellants were guilty of the offence of possession of raw opium, the conviction under s. 39B should be substituted with one under s. 6 of the Act, and a sentence of life imprisonment should be imposed on each of the appellants with six strokes under s. 39A of the Act. The sentence of imprisonment should take effect from the date of the appellants' arrest.

[Appeal by both appellants allowed. Orders accordingly].

[Bahasa Malaysia Translation of Headnote]

UNDANG-UNDANG JENAYAH: Kesabitan kesalahan di bawah s. 39B Akta Dadah Berbahaya 1952 - Rayuan terhadap kesabitan kesalahan - Sama ada kesabitan kesalahan perlu kekal - Kelewatan oleh Mahkamah perbicaraan - Kelewatan dalam perbicaraan dan dalam membekalkan alasan-alasan penghakiman - Sama ada kelewatan terlalu lama - Sama ada ia perlu dibatalkan dan digantikan dengan kesalahan memiliki ganja mentah - Seksyen 6 Akta tersebut - Hukuman - Sama ada hukuman mati harus diketepikan dan dikenakan hukuman penjara seumur hidup - Seksyen 39A Akta tersebut, s. 60, Akta Mahkamah Kehakiman 1964.

PROSEDUR JENAYAH: Kelewatan oleh Mahkamah dalam menjalankan perbicaraan dan dalam membekalkan alasan-alasan penghakiman untuk tujuan rayuan - Samada kelewatan terlalu lama - Menjejaskan pihak perayu - Sama ada sebenar atau anggapan.

Pihak perayu dalam rayuan yang disatukan tersebut dituduh secara bersesama di bawah s. 39B Akta Dadah Berbahaya 1952, mengedar 37.326 kilogram ganja mentah pada 8 Februari 1984, di Baling, Kedah. Dari tarikh penangkapan mereka dalam tahun 1984, mereka terus berada di bawah tahanan sehingga 30 Oktober 1988, di mana mereka didapati bersalah oleh Mahkamah Tinggi Alor Setar, disabitkan kesalahan dan dijatuhkan hukuman mati.

Pihak perayu membuat rayuan, atas alasan kelewatan yang terlalu lama. Perbicaraan telah bermula dalam bulan Januari 1988, ditangguhkan beberapa kali, akhirnya pihak perayu didapati bersalah dan dijatuhkan hukuman dalam bulan Oktober 1988. Perbicaraan tersebut berjalan selama 9 bulan, walaupun pihak pendakwa hanya memerlukan 5 hari dan pihak pembela dua hari untuk menyudahkan keterangan mereka. Kemudiannya terdapat kelewatan selama lebih dari 3 tahun, kali ini dalam Hakim perbicaraan memberikan alasan-alasan penghakiman atas rayuan perayu.

Diputuskan:

[1] Kelawatan tersebut adalah terlalu lama, berkaitan dengan perbicaraan dan pemberian penghakiman.

Terdapat beberapa sebab kelewatan, dan kelewatan itu sendiri boleh terdiri daripada penyalahgunaan proses atau boleh wujud dalam beberapa bentuk prejudis atau ketidakadilan. Bagi mendapatkan penggantungan perlaksanaan yang kekal, permohonan tersebut mestilah berdasarkan kepada prejudis yang sebenar atau ketidakadilan dan bukan semata-mata atas "prejudis anggapan".

Prinsip perbicaraan yang adil haruslah dipakai dengan lebih ketat apabila kelewatan yang terlalu lama tersebut bukan disebabkan oleh pihak pendakwa tetapi oleh Mahkamah yang membicarakannya.

[2] Pengemukaan bantahan kelewatan yang terlalu lama merupakan suatu model yang nyata akan sistem kehakiman yang adil, di mana setiap kes bergerak ke arah penyelesaian dalam suatu tempoh masa yang ditentukan berdasarkan kepada kepentingan dan kerumitannya. Tiada apa pun di dalam rekod rayuan dalam kes di hadapan Mahkamah yang mencadangkan bahawa kelewatan tersebut adalah berkait dengan mana-mana unsur kerumitan baik dalam kes untuk pihak pendakwa ataupun pihak pembela.

[3] Sebagaimana yang dapat dilihat daripada pelbagai penangguhan, perbicaraan tersebut telah dijalankan secara beransur-ansur selama beberapa hari pada sesuatu ketika dan ini telah

mengambil tempoh selema sembilan bulan. Adalah tidak munasabah langsung untuk menangguhkan sambung bicara perbicaraan jenayah *sine die* atau kepada suatu tarikh yang akan ditetapkan. Amalan yang sedemikian akan menjejaskan mutu serta kebolehharapan penghakiman Mahkamah dalam menimbangkan keterangan, terutamanya dalam perilaku saksi semasa pemeriksaan balas, dan kepentingan khas beberapa keterangan utama sebagai asas bagi membuat kesimpulan. Melainkan jika benar-benar perlu, Mahkamah harus menggesa supaya penghakiman lisan dibuat dalam perbicaraan jenayah, apabila keterangan yang diberikan masih lagi segar dalam fikiran semua yang berkenaan.

[4] Terdapat kelewatan yang terlalu lama dalam memberikan penghakiman oleh Hakim pebicaraan. Kelewatan tersebut tidak boleh ditolak-ansur dan memalukan pentadbiran keadilan yang patut dan cepat.

[5] Kelewatan dalam memberikan penghakiman sudah tentu membuatkan Hakim perbicaraan tersilap dari segi undang-undang apabila meletakkan beban terhadap pihak pembela untuk menjelaskan kelakuan seorang bernama Akuaili Singh atas tuduhan pengedaran. Beliau telah tertinggal daripada bertanyakan diri sendiri sama ada pihak pembela tidak mempunyai imbangan menyangkal anggapan statutori akan pengedaran di bawah s. 37(da) Akta tersebut. Beban terhadap pihak pembela hanya untuk menimbulkan keraguan dalam kes pihak pendakwa dan pihak pembela telah melepaskan bebannya di sisi undang-undang. Adalah merupakan undang-undang biasa bahawa tiada beban langsung diletakkan ke atas pihak pembela bagi menghilangkan sebarang keraguan yang telah diwujudkan dalam fikiran Hakim. Dalam ketidakhadiran Akuaili Singh untuk memberikan keterangan, undang-undang menghendaki keraguan ini diterima memihak kepada pihak perayu.

[6] Kesabitan kesalahan di bawah s. 39B Akta tersebut haruslah dibatalkan dan hukuman mati diketepikan.

Walau bagaimanapun, memandangkan terdapat bukti yang cukup bahawa pihak perayu adalah bersalah atas kesalahan memiliki ganja mentah, kesabitan kesalahan di bawah s. 39B haruslah digantikan dengan suatu sabitan dibawah s. 6 Akta tersebut, dan hukuman penjara seumur hidup dikenakan ke atas setiap perayu dan dirotan sebanyak enam kali di bawah s. 39A Akta tersebut. Hukuman penjara tersebut haruslah berkuatkuasa dari tarikh penangkapan pihak perayu.

[Rayuan oleh kedua-dua perayu dibenarkan. Perintah sewajarnya].

Cases referred to:

Yeoh Siew Khek v. Public Prosecutor (SCCA 05-13-1989)
Jago v. District Court of New South Wales [1989] 63 ALR 644
Barton & Anor. v. The Queen [1980-1981] 147 CLR 75
Voon Chin Fatt v. Public Prosecutor [1948-1949]
T.N. Nathan v. Public Prosecutor [1978] 1 MLJ 134
Yusuf bin Kassin v. Public Prosecutor [1992] 2 MLJ 183
Ling Ah Hun v. Public Prosecutor (Perak Criminal Appeal No. 26 of 1960)

Legislation referred to:

Courts of Judicature Act 1964, s. 60
Dangerous Drugs Act 1952, ss. 6, 37(d), (da), 39A, B
Prevention of Corruption Act 1961, s. 4(a)

For the appellant (Appeal No. 106 of 1988) - R. Rajasingam; M/s. R. Rajasingam & Co.
For the appellant (Appeal No. 107 of 1988) - Karpal Singh; M/s. Karpal Singh & Co.
For the respondent - Ng Aik Guan, DPP

JUDGMENT

Haji Mohd Azmi Bin Dato' Haji Kamaruddin SCJ:

The two appellants in this consolidated criminal appeal were jointly charged for trafficking in 37.326 kilogrammes of raw opium on 8 February 1984, at Jalan Ladang Kelapa Sawit, Batu Pekaka, Kuala Ketil, Baling, in the State of Kedah, an offence punishable with mandatory death sentence under s. 39B of the Dangerous Drugs Act 1952. From the date of their arrest in 1984, they had been continuously under remand right up to 30 October 1988, when they were found guilty, convicted and sentenced to death by the Alor Setar High Court. They were aggrieved by the said decision and had separately filed their notices of appeal on 1 and 2 November 1988. When their appeal came up before us on 27 September 1993, Mr. Karpal Singh, Counsel for 2nd appellant with the support of Mr. Rajasingam, Counsel for the 1st appellant, brought our immediate attention to the extraordinary long delay in supplying the grounds of judgment which he contended had

prejudiced the appellants in the prosecution of their appeal, and he therefore sought our intervention. The delay was one of the grounds contained in the petition of appeal, and Mr. Karpal Singh had obliquely referred to the case of *Yeoh Siew Khek v. Public v. Prosecutor* (SCCA 05-13-1989) dated 15 June 1993, wherein this Court (Abdul Hamid LP, Eusoff Chin SCJ, Wan Yahya SCJ) had in similar circumstances quashed the death sentence and substituted it with imprisonment for life.

In this case, the trial proper commenced on 24 January 1988. It was adjourned for continuation of hearing to 6 and 8 February, and again to 27 February. When the prosecution finally closed its case the next day on 28 February 1988, the trial was adjourned to a date to be fixed. It was finally fixed for continuation five months later to 27 July 1988. On that date the trial Judge called both the appellants to enter their defence. After giving their evidence on oath, the appellants closed their case the very next day on 28 July 1988. The trial was then adjourned three times for final submission by Counsels, and finally on 30 October 1988, both the appellants were found guilty and convicted. Thus, the whole trial was spread over a period of approximately nine months and six days, although from the events that had transpired the prosecution only required five days and the defence two days to complete their respective evidence from a total of ten witnesses inclusive of the two appellants.

Apart from the delay in the trial itself, it was not in dispute that the grounds of judgment of the learned trial Judge was supplied to the appellants, presumably through His Lordship's secretary only in February 1992, a further delay of about three years and three months from the filing of the notices of appeal in early November 1988. To acquaint ourselves with the facts leading to this long delay, we had taken it upon ourselves to examine the notes of evidence in great detail, and had discovered some startling facts. As can be seen from the numerous adjournments, the trial was chopped up and conducted on an instalment basis for a few days at a time extending over a period of more than nine months. Such a debilitating trial was certainly against the accepted practice and procedure of criminal trials in this country ever since the Registrar Circular No. 3 of 1960 was issued, which required that once a case commenced, it should be carried on from day to day until its conclusion, unless some unforseen circumstances occurred during the trial so as to make it absolutely essential for the Court to grant an adjournment. In the instant case no one could tell us why it was absolutely essential for the trial to be spread over almost the whole of 1988. We were of the view that after the first adjournment, fixing the case for continuation at a stretch for five or six days until its conclusion would have been more realistic even if it entailed in the postponement of other cases already on the hearing list. Further, if the various adjournments were unavoidable, they should be short ones so as not to lengthen the overall duration of the trial. It is certainly unacceptable to adjourn a partly heard criminal trial *sine die* or to a date to be fixed, because such a practice would inevitably result in inordinate delays in the administration of justice and affect the quality and reliability of the judgment of the Court in the evaluation of the evidence particularly in the demeanour of witnesses during cross-examination, and the special significance of certain primary evidence as the basis for making inferences. Written submissions are useful up to a point particularly on issues of law, but they invariably suffer from the same weaknesses as a delayed grounds of judgment when dealing with issues of fact. Unless absolutely essential, the Court should insist on oral submission in criminal trials, when the evidence is still fresh in the minds of all concerned.

It was against this backdrop of persistent delays in the conduct of the criminal trial that both the learned Counsels for the appellants had submitted to us at the commencement of this appeal that the interest of justice demanded that the conviction for trafficking under s. 39B and the death sentence on both the appellants could not and should not be sustained. However, it was also contended that the interest of justice warranted that in lieu thereof the conviction should be reduced to one of possession of raw opium under s. 6 read with s. 39A of the Dangerous Drugs Act, on the principal ground of prejudice to the appellants, occasioned by the three years delay in supplying them with the grounds of judgment.

The principal issue for determination was whether these delays in the trial and the supply of grounds of judgment had prejudiced the appellants, and if so what appropriate remedy should be ordered by this Court to cure or mitigate the prejudice or unfairness.

Delay in Court proceedings means that there is an excessive interval between the point when a case is commenced and when it can be adjudicated. The definition "excessive" often is not articulated but the concept is clear enough. The grievance is that an unreasonably long time is required to obtain justice. Underlying the grievance is an implicit model of a just system of justice, in which each case moves to conclusion within a time interval proportionate to its importance and complexity (see Article on Court Delay by Goffery C. Hazard Jr. in Civil Justice Quarterly 1986 at page 236).

There are however many causes of delay in Court proceedings, and the delay itself can take the form of an abuse of process or may appear in various forms of prejudice or unfairness. The principle that "justice delayed is justice denied" is of general application, and it does not follow that every form of delay, though frowned upon by the Courts, should result in vitiating the whole proceedings. In *Jago v. District Court of New South Wales* [1989] 63 ALR 644 where there was delay by the prosecution to bring an indictment, the High Court of Australia though refusing recognition of a common law right to a speedy trial, affirmed the right of an accused person to receive a fair trial as one of the fundamental rights of the accused in the administration of criminal justice. To obtain a permanent stay of prosecution, the application must however be based on actual prejudice or unfairness and not merely on "presumptive prejudice". At page 644, in refusing permanent stay, Mason CJ said:

> In the safeguarding of the interests of the accused in the manner I have described, the touchstone in every case is fairness. As appears from Toohey J's reasons for judgment and the majority judgments in the Court of Appeal, the Australian common law does not recognise the existence of a special right to a speedy trial, or to trial within a reasonable time, which relies for its operation not upon actual prejudice or unfairness but upon a concept of presumptive prejudice. Because there is no constitutional guarantee of a speedy trial, the remedies are discretionary and necessarily relate to the harm suffered or likely to be suffered if appropriate orders are not made.
>
> The test of fairness which must be applied involves a balancing process, for the interests of the accused cannot be considered in isolation without regard to the community's right to expect that persons charged with criminal offences are brought to trial: see *Barton* at 102, 106: *Sang*, at 437; *Carver v. Attorney-General (NSW)* [1987] 29 A Crim R 24 at 31, 32. At the same time, it should not be overlooked that the community expects trials to be fair and to take place within a reasonable time after a person has been charged. The factors which need to be taken into account in deciding whether permanent stay is needed in order to vindicate the accused's right to be protected against unfairness in the course of criminal proceedings cannot be precisely defined in a way which will cover every case. But they will generally include such matters as the length of the delay, the reasons for the delay, the accused's responsibility for asserting his rights and, of course, the prejudice suffered by the accused: *Barker v. Wingo* [1972] 407 US 514; *Bell v. DPP* [1985] AC 937, as explained in *Watson and Gorman v. Fitzpatrick* [1987] 32 A Crim R 330. In any event, a permanent stay should be ordered only in an extreme case and the making of such an order on the basis of delay alone will accordingly be very rare: *Re Cooney* [1987] 31 A Crim R 256 at 263-264.

Thus, the High Court in *Jago* strongly echoed its earlier decision in *Barton & Anor. v. The Queen* [1980 - 1981] 147 CLR 75 in dealing with the requirement of fairness as an essential ingredient to trial. In *Barton*, the main judgment of Gibbs A.C.J. and Mason J. (as he then was) at page 95 had this to say:

> It is one thing to say that the filing of an *ex officio* indictment is not examinable by the courts: it is quite another thing to say the courts are powerless to prevent an abuse of process or the prosecution of a criminal proceeding in a manner which will result in a trial which is unfair when judged by reference to accepted standards of justice. The Courts exercise no control over the Attorney-General's decision to commence criminal proceedings, but once he does so, the Courts will control those proceedings so as to ensure that the accused receives a fair trial.

Further down the page,

> There is ample authority for the proposition that the courts possess all the necessary power to prevent an abuse of process and to ensure a fair trial.

In our view, the principle of fair trial laid down in *Barton* and *Jago* is well founded, and should be applied even more rigorously where the excessive delay is caused not by the prosecution but by the trial Court itself.

Having pursued the Appeal Record, we could not find anything to suggest that the shocking delay in this case was in any way connected with any element of complexity in either the case for the prosecution or that of the defence. The prosecution case was the usual and typical ambush carried out by the police on a vehicle which resulted in the recovery of a large quantity of dangerous drug. At the material time, the 2nd appellant (Tew He Lay) was in the driver's seat, while the owner of the motorcar, the 1st appellant (Tan Hun Wah) was seated next to him. These basic facts were not seriously challenged, and in the circumstance of the other relevant evidence adduced by the prosecution, it could not be disputed that both the appellants were indeed in custody or control of the raw opium so as to attract the presumption of joint possession by the appellants under s. 37(d) of the Act. The huge amount of drug also attracted the presumption of trafficking under s. 37(da).

The defence of both the appellants was one of innocent carriers, and consequently they denied trafficking in the said drug. They ostensibly put the blame on one Akuaili Singh, as the real culprit in the whole episode. At page 85 of the Notes of Evidence, there appeared to be some difficulty in obtaining the presence of this material and crucial witness. In applying for adjournment on 19 September 1988, Mr. Rajasingam informed the Court without any apparent contradiction by the prosecution as follows:

> (PW5) ... ASP. Khalid's evidence had mentioned about the arrest of Akuaili Singh. The name of Akuaili Singh was bandied about by the investigating officer. The way (PW5) answered the question was that the prosecution was suppressing the arrest of Akuaili Singh on 8 February 1984. I have finally traced Akuaili Singh. He is in restricted residence in Kangar and has now gone to General Hospital Kuala Lumpur for an eye operation. From instruction given by No(1) it would be .... necessary to bring him to Court. It might clear up a lot of doubt or it may give a greater credibility to the prosecution ...

When the hearing resumed on 16 October 1988, the Notes of Evidence at page 86 disclosed that Mr. Rajasingam had again asserted that Akuaili Singh had been arrested by ASP Khalid (PW5) on 8 February 1984, but since then he had simply disappeared without any trace.

In dealing with the defence in his grounds of judgment supplied more than three years after the conclusion of the trial, the learned Judge had apparently failed to appreciate the significance of the alleged arrest of Akuaili Singh by ASP Khalid on 8 February 1984, that is, the very date of arrest of the appellants. Instead, His Lordship had indulged in a sort of soliloquy by answering various questions which he himself had posed on various issues including that of Akuaili Singh, the effect of which would tend to require the appellants to prove their innocence. What the learned Judge had omitted to do was to ask himself in the face of the prosecution failure to call Akuaili Singh as a witness or at least to offer him to the defence, whether the defence had on balance rebutted the statutory presumption of trafficking under s. 37(da). Had he done so, as a separate exercise to the other presumption of possession under s. 37(d), His Lordship would have avoided the pitfall of asking himself the wrong questions, after conceding the probable role of Akuaili Singh in the arrest of the appellants, as contained in the following passage in his grounds of judgment:

> It did occur to me that there was a possibility that Akuaili Singh could have planted the drug in the boot of Accused No. 1's car. In fact he did have the opportunity in the span of those 40 minutes to do so. But then the question which the Court must ask is, why did he have to leave those 37 grammes of raw opium in the Accused No. 1's car and risked the prospect of losing the drug and the money that goes with it. Why should Akuaili Singh stick his head out if he was found out by Accused No. 1 for planting the drug in the boot of Accused No. 1's car. If it was Akuaili Singh's car, it would be different, but it was not his car. It was in Accused No. 1's car. It would be safer and better for Akuaili Singh to have disposed off the drug in the first place and then returned the car to Accused No. 1 safe and sound. It may well be that he wanted to frame up Accused No. 1, but there must be a good and cogent reason, and there was no raison d'etre or rationale for Akuaili Singh to do that. The fact that bothers me was that why wasn't there any yellow car following or trailing Accused No. 1's car driven by Accused No. 2, in which Accused No. 1 was a passenger. Akauili Singh could have been the culprit; but why didn't he keep his eyes on Accused No. 1's car.

The delays in this case must have contributed to this fatal omission and therefore had prejudiced the appellants. Akuaili Singh was not a figment of the appellants' imagination. If this crucial witness were indeed arrested by the police, his

whereabouts ought to be known by them. As such, if the various acts and conduct of Akuaili Singh were irrational and had remained unexplained, the blame should be laid at the door of the prosecution for not calling him as a witness to explain himself or to make him available to the defence. The burden on the defence is merely to cast a reasonable doubt in the prosecution case. From the quoted passage in the grounds of judgment, it seemed obvious that the defence had discharged its legal burden. The learned Judge therefore erred in law in placing the *onus* on the defence to clear the unexplained behaviour of Akuaili Singh on the trafficking charge.

If indeed the learned Judge had entertained the probability that Akuaili Singh had framed up the 1st appellant, or that Akuaili Singh could have been the trafficker, then it would be the duty of the learned Judge to find both the appellants not guilty of trafficking under s. 39B, but guilty only of mere possession under s. 6 read with s. 39A. As referred to earlier, it is trite law that no burden at all is placed on the defence to clear whatever doubts that have been created in the mind of the learned Judge, and in the absence of Akuaili Singh giving evidence, the law requires that these doubts must be resolved in favour of the appellants.

Going back on the issue of delay in supplying the grounds of judgment in a criminal appeal, the authority cited to us by Mr. Karpal Singh would appear to rest on the ancient axiom that "Justice delayed is Justice denied". In *Voon Chin Fatt v. Public Prosecutor* [1948-1949] MLJ Supplement 131, 133 there was a delay of two years in delivering the grounds of judgment. Spencer Wilkinson, J. in allowing the appeal held that such delay was unsatisfactory and had prejudiced the appellant. The decision was followed by Gunn Chit Tuan J. (as he then was) in *T. N. Nathan v. Public Prosecutor* [1978] 1 MLJ 134. In that case the appellant was convicted of an offence under s. 4(a) of the Prevention of Corruption Act 1961. The retrial started on 13 June 1972, and was carried out for 77 days over a period of fourteen months. It was concluded on 20 August 1973 and on 29 August 1973, the appellant filed a notice of appeal. But the grounds of decision dated 20 July 1974, was not supplied to the Counsel until 2 July 1976. In allowing the appeal, the learned Judge held *inter alia,* that the delay of another two years before the appellant received the grounds of decision was most unsatisfactory and a prejudice to the appellant.

Counsel for the appellants also cited to us the case of *Yusuf bin Kassim v. Public Prosecutor* [1992] 2 MLJ 183 at 187 in which Edgar Joseph Jr. SCJ., in delivering the judgment of this Court, held that the Appellate Court should presume that the trial Judge had failed to take into account certain facts favourable to the accused, where such facts had been omitted in the grounds of judgment supplied to the solicitors of the appellants some four years after the notice of appeal had been lodged.

Where prejudice or unfairness had been sufficiently established, we agreed with and adopted the principle enunciated in the authorities cited before us on the effect of excessive delay not only in the supply of grounds of judgment but also delay in the trial itself. If the facts of the case so warrant, where there is a long delay in the supply of grounds of judgment, an appellate Court would readily accept the allegation of prejudice on the basis that there is every likelihood not only that the trial Judge's impression on demeanour of witnesses would be blurred, but also the delay would increase the chances of omission on the part of the trial Judge to deal with material facts and issues in the grounds of judgment, which ought to have been favourable to the appellants. Such danger would of course increase by manifolds, when, as in the present case, the trial itself was conducted by instalments over a long period. In this connection, it is relevant to refer to to the case of *Ling Ah Hun v. Public Prosecutor* (Perak Criminal Appeal No. 26 of 1960) referred to in [1960] 26 MLJ October xlv, where Rigby J. said:

> But before I leave this case, I desire to draw attention to what I consider the quite intolerable delay in the proceedings before the learned President. The offence was committed on 6 January 1959, and both appellants were arrested that same day. Thereafter, there were a number of adjournments, primarily because, as it would appear from the record, the prosecution itself at that time was undecided as to whether the case should go for a preliminary enquiry or as to whether it should be dealt with summarily by the learned President. Finally, it was decided that the case should be summarily dealt with, and the trial commenced on 10 June 1959 - 5 months after the offence had been committed. It was then part heard, and did not continue until 16 July - again, some 6 weeks later. On 16 July the trial concluded and the learned President recorded a conviction. Quite properly, thereafter he adjourned the case

in order to obtain a Probation Officer's report. Proceedings were again heard on 5 August, and sentence was passed on that day. Notice of appeal was at once given that same day, 5 August, and the appellants were released on bail pending the determination of the proceedings. On the notice of appeal being filed it was incumbent upon the learned President to provide his grounds of decision, and for the petition of appeal to be lodged within 10 days after the grounds of decision had been so provided. Those grounds of decision were not supplied until 26 February 1960. It apparently took the learned President 6 months and 21 days in which to prepare the grounts of decision in this relatively short and simple case. Delays of this nature are wholly intolerable and make an utter farce of the proper and expeditious administration of justice.

As far as prejudice or unfairness was concerned there ought to be no distinction in principle between delays in the High Court and the Subordinate Courts. We would with respect adopt the opinion of Rigby J. and held that in the present appeal, the delay of three years in supplying the grounds of judgment from the date of filing of the notices of appeal was wholly intolerable and made an utter farce of the proper and expeditious administration of justice.

On the facts of the present appeal, we found prejudice had been sufficiently demonstrated from the notes of evidence and the grounds of judgment as a result of delays not only in the trial itself but also in supplying the grounds to the appellants or their solicitors. The grounds of judgment was strangely undated, resulting in our inability to determine when the grounds were prepared and signed by the learned Judge. Be that as it might, there was no dispute that the document was supplied to the appellants only three years after the filing of the notices of appeal. We were not told of any reason for the delays. In any event, such reason (if any) was irrelevant once the Court was satisfied that the appellants had been prejudiced, and the only matter left was to decide how the prejudice could be remedied or mitigated.

The facts and the circumstances of this case required us to exercise the curial function of this Court in the administration of criminal justice in the context of the power conferred by s. 60 of the Courts of Judicature Act 1964, to "vary the decision of the trial Court or ... make such other order in the matter as to it seems just and may by that order exercise any power which the trial Court might have exercised."

The learned Deputy Public Prosecutor, Mr. Ng Aik Guan had quite properly indicated to the Court that he had no objection to the remedy which we had intended to provide in this particular case. Having considered the evidence and the circumstances of the present case, we ordered that the appeal by both the appellants be allowed. Consequently we ordered that their conviction under s. 39B of the Dangerous Drugs Act be quashed and the death sentence set aside. Since there was ample evidence that the appellants were guilty of the offence of possession of raw opium, which incidently was also the submission of their Counsels, we ordered that the conviction under s. 39B be substituted with one under s. 6 of the Dangerous Drugs Act and we imposed on each of the appellants a sentence of life imprisonment with six strokes under s. 39A of the Act. To satisfy the justice of the case, we also ordered that the sentence of imprisonment should take effect from the date of their arrest.